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## *Birchfield et al.*

### Criminalizing Refusals: A Prosecutor's "Tool" in Doubt

By M. Kimberly Brown

**T**he upcoming U.S. Supreme Court decision in *Birchfield et al.*<sup>1</sup> may significantly change the way prosecutors and police handle impaired driving cases. The Court recently granted writ of certiorari to determine whether a state may criminalize a suspect's refusal to take a chemical test to detect alcohol<sup>2</sup> in his blood.<sup>3</sup>

Criminalizing refusals is a "tool" prosecutors and police may use to enforce impaired driving laws. The refusal statutes at issue in *Birchfield et al.* existed when the Court decided *McNeely*.<sup>4</sup> The Court should decide that a state may criminalize a suspect's refusal because it is within the reserved powers of the state legislatures, is a reasonable exercise of police powers under the circumstances, and does not unreasonably infringe on a driver's rights. Moreover, if the Court requires an officer to secure a warrant to obtain blood, that would not guarantee a suspect will cooperate with a blood draw, does not make the search any more reasonable, and may not always be possible. To prohibit states from criminalizing refusals would encourage nonconsensual, forced blood draws on impaired drivers, needlessly expose police officers and medical personnel to the violent or dangerous behavior of impaired drivers who do not wish to be tested, and may unnecessarily subject the police and medical staff to civil liability. In addition, since the entire legal system is based on resolving disputes in court and not on the street, the proper forum to challenge the reasonableness of a search (or the lack thereof) is

the courtroom. For the following reasons, the U.S. Supreme Court should hold that a state may make it a crime for a suspect to refuse to take a chemical test to detect the presence of alcohol and/or drugs in his blood when probable cause exists that he was driving while impaired.

#### Background Facts

In each of the three cases before the Court, the defendant was arrested for impaired driving. Each defendant was provided the implied consent advisory by a police officer.

- *Birchfield* submitted to a preliminary breath test with a .254 percent alcohol concentration but refused to consent to a chemical test. He later conditionally pled guilty to misdemeanor refusal to submit to a chemical test, reserving his right to appeal the court's denial of his motion to dismiss the charge on constitutional grounds. The North Dakota Supreme Court held that the criminal refusal statute did not violate the 4<sup>th</sup> Amendment or the search and seizure provision of the North Dakota Constitution either facially or as applied to *Birchfield*.
- *Beylund* agreed to submit to a blood test, the results of which were .25 grams of alcohol per 100 ml of blood. As a result of *Beylund*'s alcohol level, his driver's license was subsequently suspended. He petitioned for reconsideration of the hearing officer's decision to suspend the license arguing that the blood test was an unconstitutional warrantless search, without a valid exception.

- Bernard refused to submit to a chemical test. Bernard was charged with a refusal offense and filed a motion to dismiss, arguing the statute violated due process because the statute makes it a crime to refuse an unreasonable, warrantless search of a driver's breath. The lower court ruled the refusal statute was not unconstitutional on its face but dismissed Bernard's case because the police lacked a lawful basis to search him without a warrant (*i.e.*, that police lacked a legal reason to arrest him for impaired driving). The court of appeals reversed, holding that Bernard's due process rights were not violated by prosecuting him for refusal because the facts of his case established the police officers had probable cause and could have secured a search warrant. The Minnesota Supreme Court held that the search was valid under the search-incident-to-arrest exception to the warrant requirement and that the refusal statute is a reasonable means to a permissive objective.

### States' Powers

The U.S. Supreme Court has recognized the power of states to enact laws to aid the police function of protecting the safety of its people.<sup>5</sup> The Court has also recognized society's problem with impaired driving and that it occurs with "tragic frequency on our Nation's highways. The carnage caused by drunk drivers is well documented and needs no detailed recitation . . . This Court, although not having the daily contact with the problem state courts have, has repeatedly lamented the tragedy."<sup>6</sup> In fact, the Court has "traditionally accorded the states great leeway in adopting summary procedures to protect public health and safety. States surely have at least as much interest in removing drunken drivers from their highways as in summarily seizing mislabeled drugs or destroying spoiled foodstuffs."<sup>7</sup> States "must have the authority, if it is to protect people from drunken drivers, to require that the breath-analysis test record the alcoholic content of the bloodstream at the earliest possible moment."<sup>8</sup>

States have the power to enact laws to protect public health and safety and have considerable interest in promoting and maintaining safe roadways, especially from the dangers of impaired drivers. States, therefore, may highly regulate the privilege to drive. While vehicles may be safely operated in the ordinary course, when operated recklessly or by an impaired driver, they become lethal weapons. It is reasonable for a legislature to determine that chemical testing of an impaired driver would be helpful to the identification and successful prosecution of him, and that a refusal to submit to testing impedes this objective. Penalizing a refusal, therefore, "...serves the legitimate legislative goals of deterring such refusals and ensuring that those who refuse gain no benefit by their refusal."<sup>9</sup>

Under the U.S. Constitution, there is a fundamental right to "liberty," which includes the freedom of movement and interstate travel.<sup>10</sup> Each state, however, may regulate the manner and method of travel on the public roadways. There is no constitutional right to drive, only a privilege bestowed by a state. As a prerequisite to the privilege to drive, every state has enacted an implied consent law which, in essence, conditions an individual's privilege on the fact he has agreed to (*i.e.*, impliedly consented to) submit to chemical testing if and when a police officer has probable cause to believe the driver is impaired by alcohol or drugs.

In the past, the Court has declined to recognize a constitutional right to refuse to take a chemical test.<sup>11</sup> The North Dakota

Supreme Court also observed that before the criminal refusal statute was enacted, there was "no Federal constitutional right to be entirely free of intoxication tests . . .," and that there existed only a conditional right to refuse, based on the licensing consequences for a refusal.<sup>12</sup> It logically follows that states would condition an individual's privilege to drive upon his agreement to submit to chemical testing if probable cause exists to believe he is driving while impaired. It is also rational to sanction a suspect who later withdraws his consent, or reneges on the agreement, to submit to testing. To refuse testing prevents the state from obtaining evidence to later be used against the driver in a criminal prosecution for impaired driving. Rather than allow the suspect to benefit from that refusal, holding him criminally accountable serves a legitimate state interest in keeping dangerous drivers off the public roads.<sup>13</sup>

### Constitutional Considerations

#### 1. Fourth Amendment

The Fourth Amendment guarantees the right of people to be free from unreasonable searches. The law requires police to have a warrant to conduct a search unless a valid exception exists. For example, exigent circumstances, search incident to arrest, and consent are three acceptable exceptions.

##### a. Exigency

The Supreme Court held in *Schmerber v. California* that a warrantless, non-consensual test of an impaired driver's blood did not violate the Fourth Amendment against unreasonable searches.<sup>14</sup> The officer in *Schmerber* "...might reasonably have believed that he was confronted with an emergency, in which the delay necessary to obtain a warrant, under the circumstances, threatened 'the destruction of evidence,' . . ."<sup>15</sup> In other words, the natural dissipation of alcohol from the body created an exigency found acceptable by the *Schmerber* Court.

That same exigency, however, was not found in *Missouri v. McNeely*.<sup>16</sup> Factually similar to *Schmerber*, the *McNeely* Court refused to establish a bright line of exigency in all cases based upon the natural dissipation of alcohol in the body. Instead, the *McNeely* Court established a totality of the circumstances test to determine the case-by-case appropriateness of a warrantless search of an impaired driver's blood. Importantly, the *McNeely* Court did not reverse *Schmerber*.

##### b. Search Incident to Arrest

While the Minnesota Court of Appeals decided that the police could have obtained a search warrant for Bernard (*i.e.*, the police had probable cause), the Minnesota Supreme Court refused to recognize a probable cause exception to the warrant requirement and rejected that rule.<sup>17</sup> Instead, relying on numerous other cases in which warrantless searches of the body were upheld, the Minnesota Supreme Court accepted the argument that it would have been appropriate to search Bernard pursuant to the search incident to arrest exception. As described above, the Minnesota Supreme Court validated the state's ability to take a driver's breath sample as a warrantless search because the search did not violate the Fourth Amendment requirement for a warrant.

### c. Consent

Consent is another valid exception to the warrant requirement. As described above, as part of its impaired driving deterrence, every state has an implied consent law. Some courts have not taken the position that implied consent is a valid “per se” exception to the warrant requirement.<sup>18</sup> At least one state has determined that in order for consent to be valid, a driver must have the ability to ultimately refuse when requested to submit to a chemical test.

<sup>19</sup> In other words, without the ability to refuse, some states have deemed such consent to be coerced and disallowed the use at trial of subsequent test results, while in other jurisdictions, even the failure to provide proper notice of the consequences of refusals do not violate due process.<sup>20</sup>

Like many states’ implied consent laws,<sup>21</sup> North Dakota’s and Minnesota’s implied consent laws provide an individual who drives a vehicle is deemed to have given consent to submit to a chemical test after being placed under arrest for driving under the influence.<sup>22</sup> Both states also make it a crime to refuse to submit to chemical testing after an arrest for impaired driving.<sup>23</sup> A police officer is required to advise an individual of the consequences of his refusal to submit to testing.<sup>24</sup> If a person refuses to submit to testing, however, no test may be given in North Dakota, while a test may still be performed in Minnesota.<sup>25</sup> In North Dakota, if an officer has reasonable grounds to arrest a driver, the driver submits to a chemical test, and the results show the driver to have an alcohol concentration in his blood of at least .08% by weight at the time of testing, his license shall be suspended.<sup>26</sup>

Implied consent laws essentially condition a driver’s privilege to drive on the fact he has impliedly consented to submit to chemical testing, if and when a police officer has probable cause to believe the driver is impaired by alcohol or drugs. In fact, the Supreme Court explicitly recognized the benefits of these types of laws in *McNeely*. Specifically, the *McNeely* Court indicated, “[s]tates have a broad range of legal tools to enforce their drunk-driving laws to secure BAC [(blood alcohol concentration)] evidence without undertaking warrantless nonconsensual blood draws. For example, all 50 States have adopted implied consent laws that require motorists, as a condition of operating a motor vehicle within the State, to consent to BAC testing if they are arrested or otherwise detained on suspicion of a drunk-driving offense. [Citations omitted.] Such laws impose significant consequences when a motorist withdraws consent....”<sup>27</sup> Although the *McNeely* Court identified a driver’s license suspension or revocation and the use of the refusal in a subsequent prosecution as “significant consequences” the list was clearly not exhaustive and, presumably, includes within the “broad range of legal tools,” the criminal sanctions for refusing to submit to testing.<sup>28</sup>

### d. No Search

The Court could also resolve the entire constitutional issue of whether a refusal statute violates a driver’s Fourth Amendment rights by simply finding that no search occurred. When a driver refuses to be tested, and there is no test administered, then it follows that no search occurred about which the parties need to litigate.<sup>29</sup> Likewise, the Court should focus attention on the constitutionality of the arrest, rather than the imagined unconstitutionality of a non-existent search.<sup>30</sup>

## 2. Fifth Amendment

A suspect’s due process rights are also not violated by criminalizing refusal. On more than one occasion, the Supreme Court has found no due process violation when, upon a suspect’s refusal to submit to testing, a state suspends a suspect’s driver’s license prior to holding an evidentiary hearing.<sup>31</sup> Additionally, the Supreme Court has allowed states to force defendants to submit to blood-alcohol tests without violating constitutional rights against self-incrimination.<sup>32</sup> As mentioned above, some jurisdictions have found no due process violation even when a police officer fails to provide to a suspect notice of the consequences of his refusal.<sup>33</sup>

### Other Considerations

If the Court holds that the criminalization of a refusal is unconstitutional, it will likely result in the increase in the number of non-consensual chemical tests, even when an officer obtains a warrant. Increasing the number of non-consensual chemical tests is not the best way to handle refusals and there are other policy reasons why such laws are reasonable. Allowing a driver to refuse to submit to chemical testing may be reasonable but having consequences for that refusal is also reasonable. Allowing the refusal, and the logical consequences that follow, avoids the volatility of a nonconsensual blood draw which is likely to happen when a warrant is required and the choice to submit to a test is taken away from the suspect. Rather, pursuant to a warrant, the suspect would then be required to provide a blood sample.

There are other justifications supporting arguments for the appropriateness or reasonableness of the criminal refusal statute. One example supporting criminal refusals is based on a destruction of evidence theory. In this regard, a search incident to arrest justifies the warrantless search of an impaired driver in order to avoid the destruction of critical blood-alcohol evidence that supports the impaired driving charge.<sup>34</sup> Similarly, criminalization of refusal could legitimately be akin to impeding an investigation or concealing evidence.<sup>35</sup> Likewise, it can be analogized that a refusal crime is similar to a crime of obstruction of justice. For example, Minnesota provides for an offense of obstructing legal process when the refusal is also accompanied by actual or threatened force or violence.<sup>36</sup> In another jurisdiction, a defendant’s refusal to participate in field sobriety tests was enough to support a separate offense of obstruction of justice.<sup>37</sup> Lastly, the Court could find that refusing to submit to chemical testing is similar to other “failure to act” crimes. For instance, in one jurisdiction, the crime of failing to identify oneself to the police during a *Terry* stop did not violate the guarantees of the Fourth Amendment.<sup>38</sup>

### Conclusion

With these three consolidated cases, the Supreme Court has the opportunity to provide prosecutors and law enforcement with needed guidance on whether a state may, in the absence of a warrant, criminalize a driver’s refusal to submit to chemical testing when probable cause exists that he is driving while impaired. Refusal laws are no different from other criminal laws created within the purview of the states’ legislative power. When the state’s substantial interest in keeping public roads safe from impaired drivers is balanced against the privacy interests of the driver, the Court’s analysis should recognize the value of implied consent laws and affirm the legitimacy of this legal tool. Invalidating refusal laws

would be tantamount to requiring a warrant in every impaired driving case which would be unnecessary and burdensome. Subjecting a driver to a search to determine his BAC when probable cause exists that he is driving while impaired is reasonable. Allowing the driver the option to choose his consequence when faced with the offer to submit to chemical testing minimizes more invasive nonconsensual blood tests.

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## Endnotes

- 1 *Birchfield v. North Dakota*, 858 N.W.2d 302 (2015), *cert. granted*, 136 S.Ct. 614 (Dec. 11, 2015) (No. 14-1468); *Bernard v. Minnesota*, 859 N.W.2d 762 (2015), *cert. granted*, 136 S.Ct. 615 (Dec. 11, 2015) (No. 14-1470); *Beylund v. Levi*, 859 N.W.2d 403 (2015), *cert. granted*, 136 S.Ct. 614 (Dec. 11, 2015) (No. 14-1507).
- 2 Although each case involved impairment by alcohol, the Supreme Court's decision will likely affect impairment cases involving alcohol and/or drugs. Therefore, alcohol and drugs are generally used interchangeably in this article.
- 3 See *Birchfield et al.*
- 4 *Missouri v. McNeely*, 133 S. Ct. 1552 (2013).
- 5 See *Mackey v. Montrym*, 443 U.S. 1 (1979) and *South Dakota v. Neville*, 459 U.S. 553 (1983).
- 6 *Neville* at 558.
- 7 *Montrym* at 17-18.
- 8 *Montrym* at 15.
- 9 *Jensen v. State*, 667 P.2d 188 (1983).
- 10 See Kathryn E. Wilhelm, Note, *Freedom of Movement at a Standstill? Toward the Establishment of a Fundamental Right to Intrastate Travel*, 90 BU 6 (2010).
- 11 See *Schmerber v. California*, 384 U.S. 757 (1966); see also *Skinner v. Railway Labor Execs. Ass'n*, 489 U.S. 602 (1989) (no 4th Amendment violation to test railroad employees who violated safety regs or were involved in accidents).
- 12 *Birchfield v. North Dakota*, 858 N.W.2d 302, 304-305 (2015) citing *State v. Murphy*, 516 N.W.2d 285, (N.D. 1994).
- 13 The legislature created a statutory right to refuse but attached significant consequences to it so that a driver "...may not avoid the potential consequences of test submission and gain advantage by simply refusing the test." *Birchfield* at 309, citations omitted. In *Birchfield*, the driver submitted to a PBT with a high result; by refusing further testing, while subject to penalty for the refusal, he "...was able to avoid the enhanced penalties for being highly intoxicated." *Birchfield* at 309.
- 14 *Schmerber v. California*, 384 U.S. 757 (1966).
- 15 *Schmerber* at 770.
- 16 *Missouri v. McNeely*, 133 S. Ct. 1552 (2013).
- 17 *Bernard v. Minnesota*, 859 N.W.2d 762, 766 (2015).
- 18 See *Implied Consent: No Exception to the Warrant Requirement, Between the Lines* (National Traffic Law Center, Alexandria, VA), Vol. 23, No. 1.
- 19 See *State v. Won*, 2015 WL 7574360 (Nov. 25, 2015).
- 20 See *Kanikaynar v. Sisneros*, 190 F.3d 1115 (10<sup>th</sup> Cir. 1999).
- 21 During the pendency of *Birchfield et al.* before the U.S. Supreme Court, the Kansas Supreme Court held that the Kansas criminal refusal statute (Kan. Stat. Ann. §8-1025 (Supp. 2014)) is facially invalid under the U.S. Constitution based on substantive due process rights flowing from search and seizure principles. See *State v. Ryce*, 2016 Kan. Lexis 107, *State v. Nece*, 2016 Kan. Lexis 106, and *State v. Wycoff*, 2016 Kan. Lexis 105.
- 22 See North Dakota Century Code Annotated (NDCC), §39-20-01; Minnesota Statutes Annotated (MSA) § 169A.51, subd. 1.
- 23 See NDCC §39-08-01; MSA § 169A.20, subd. 2 and MSA § 169A.51, subd. 2
- 24 See NDCC § 39-20-01(3)(a); MSA § 169A.51, subd. 2.
- 25 See NDCC § 39-20-04; MSA § 169A.51, subd. 2.
- 26 See NDCC § 39-20-04.1.
- 27 *Missouri v. McNeely*, 133 S. Ct. 1552, 1566 (2013).
- 28 *Id.*
- 29 As the North Dakota Supreme Court recognized in *Birchfield*, that because the driver refused to be tested, as was his right under the statute, and was therefore not tested, no search occurred and no Fourth Amendment violation. *Birchfield v. North Dakota*, 858 N.W.2d 302, 307-308 (2015).
- 30 In any event, any challenges to the search should be litigated in court. The North Dakota Supreme Court in *Birchfield* quotes from *Burnett v. Municipality of Anchorage*, 806 F.2d 1447, 1451 (9<sup>th</sup> Cir. 1986), in which the Ninth Circuit Court of Appeals upheld Alaska's criminal refusal statute against a Fourth Amendment challenge: The driver's "...basic argument is that they have been deprived of their right to be free of unreasonable searches. Nothing in the Alaska statutes here at issue deprives them of that right, or otherwise burdens it. A motorist who is stopped DWI and who wishes to vindicate himself has two choices under the law. He may take the test as the state prefers him to do. If he does, and the evidence obtained is favorable to him, he will gain his prompt release with no charge being made for drunk driving. See *Mackey v. Montrym*, 443 U.S. [1, 19, 99 S. Ct. 2612, 61 L.Ed.2d 321 (1979)]. If the evidence is unfavorable, he may challenge the government's use of that evidence by attacking the validity of the arrest. If he does not take the test, he can still challenge the evidence of his refusal by once again attacking the validity of the arrest. Either way, he remains fully capable of asserting the only Fourth Amendment right he possesses: the right to avoid arrest on less than probable cause. Thus, no improper condition has been placed on the exercise of...[the driver's] rights under the Fourth Amendment."
- 31 See *Mackey v. Montrym*, 443 U.S. 1 (1979).
- 32 See *South Dakota v. Neville*, 459 U.S. 553 (1983) and *Schmerber v. California*, 384 U.S. 757 (1966).
- 33 See *Kanikaynar v. Sisneros*, 190 F.3d 1115 (10<sup>th</sup> Cir. 1999).
- 34 Stated differently, the destruction of evidence is an exigent circumstance that would justify a warrantless search. This theory served as the basis for the justification supporting exigency by four Justices in *McNeely*.
- 35 See *Jensen v. State*, 667 P.2d 188 (1983).
- 36 See MSA § 609.50.
- 37 See *State v. Orr*, 335 P.3d 51 (2014).
- 38 See *Hübel v. Sixth Judicial District Court*, 542 U.S. 117 (2004).

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